IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 10, 2006 Session

GARY L. HARVEY, *ET AL.* v. STANLEY F. LADUKE, *ET AL.*

Appeal from the Circuit Court for Knox County
No. 3-270-04 Wheeler Rosenbalm, Judge

No. E2005-00533-COA-R3-CV - FILED MARCH 20, 2006

Appellant filed an action for relief from a Judicial Commissioner's refusal to issue Tenn. R. Crim. P. 4(a) criminal process to a private citizen without the filing of a police report. The primary issue before this court is whether Rule 20 of the Rules of Procedure of the General Sessions Court of Knox County, Tennessee, which relates to the duty of a Judicial Commissioner, is inconsistent with Tenn. R. Crim. P. 4(a) and, thus, invalid. The trial court granted summary judgment to all defendants on each of Appellant's causes of action. Because we find Rule 20 to be invalid, we affirm in part, reverse in part, and remand for further proceedings.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part and Reversed in Part; Case Remanded

SHARON G. LEE, J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., and D. MICHAEL SWINEY, JJ., joined.

Herbert S. Moncier, Knoxville, Tennessee, for the Appellant, Gary L. Harvey.

Mary Ann Stackhouse, Knox County Deputy Law Director, Knoxville, Tennessee, for the Appellees, Judicial Commissioner Stanley F. LaDuke and Knox County, Tennessee.

OPINION

I. Factual and Procedural Background

Appellant, Gary L. Harvey ("Mr. Harvey"), claims that on May 10, 2003, James Michael Evans ("Evans"), Benjamin R. Gresham ("Gresham"), and Thomas Erick Tipton ("Tipton"), all law enforcement officers, criminally trespassed on his property and assaulted him.[1] On May 7, 2004, Mr. Harvey learned that the statute of limitations would soon expire on any misdemeanors committed by Evans, Gresham, and Tipton unless prosecution was commenced within one year of the alleged offenses. Thus, on that date, Mr. Harvey presented an affidavit of complaint, along with an attached letter, to Knox County Judicial Commissioner Stanley F. LaDuke ("Judicial Commissioner" or "Mr. LaDuke")[2] for the issuance of criminal summons to Evans, Gresham and Tipton for the offenses allegedly committed. Mr. LaDuke informed Mr. Harvey, however, that he would not issue a criminal summons against a law enforcement officer. The Judicial Commissioner did not file the affidavit of complaint, but returned it to Mr. Harvey. He advised Mr. Harvey that the District Attorney would be present at 2:30 p.m. that day and that appellant could discuss the Judicial Commissioner's refusal to issue a criminal summons with him. Mr. Harvey then faxed a second letter to Mr. LaDuke, as well as to the Knox County Law Director and the District Attorney, indicating that he would be present at 2:30 p.m. for the criminal summons to issue as directed. When Mr. Harvey returned as scheduled and again requested that a criminal summons issue, two Knox County Sheriff's Deputies were present in the room. A Knox County Assistant District Attorney appeared to inform Mr. LaDuke that the District Attorney's office was recusing itself in the matter. Mr. LaDuke again told Mr. Harvey that he would not issue a criminal summons without an investigation by a law enforcement agency, but that after such an investigation, he would consider the investigation's results in determining whether there was probable cause to issue the criminal summons. Although Mr. Harvey proffered a witness, the Judicial Commissioner refused to question him. Knox County General Sessions Court Judge Chuck Cerny then arrived and explained that there is a custom and practice in Knox County that a law enforcement agency first investigates a private citizen's complaint prior to a Judicial Commissioner accepting an affidavit of complaint.

On May 10, 2004, Mr. Harvey filed a petition pursuant to Tenn. R. Civ. P. Rule 65 for a mandatory injunction in aid of his application for a writ of mandamus pursuant to T.C.A. § 29-25-101, *et seq*. to order Mr. LaDuke to issue the requested criminal summons. However, his petition was promptly denied by Knox County Circuit Court Judge Wheeler A. Rosenbalm ("Judge

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[1]Mr. Harvey filed a civil rights lawsuit alleging, *inter alia*, assault and battery, in the United States District Court for the Eastern District of Tennessee, No. 3:04-cv-192, on April 29, 2004. On April 30, 2004, Mr. Harvey filed a civil rights action alleging, *inter alia*, assault and battery, in the Circuit Court for Knox County, Tennessee, No. 1-251-04.

[2]Pursuant to T.C.A. § 40-5-201, Mr. LaDuke is a duly appointed Judicial Commissioner for Knox County, Tennessee. Judicial Commissioners are appointed by the General Sessions judges of the county. Among Mr. LaDuke's duties include the determination of probable cause to issue criminal arrest warrants and criminal summons. *Id.*

Rosenbalm"), who opined "that the petition was susceptible of another motivation," and that the trial court did not have the authority to order the Judicial Commissioner to perform a judicial function by mandamus.[3] The following day, Mr. Harvey filed an amended petition incorporating his action for mandamus and seeking additional relief by certiorari pursuant to T.C.A. §§ 27-8-101 and 27-8-102; declaratory judgment pursuant to T.C.A. § 29-14-101, *et seq.*; malicious harassment pursuant to T.C.A. § 4-21-701; failure and/or neglect to perform duties; added Knox County, Tennessee, as a defendant; sued in the name of the State of Tennessee on his relationship as a citizen and resident of Tennessee; sued on Mr. LaDuke's official bond pursuant to T.C.A. § 8-19-301; and added Hartford Insurance Company as a defendant as insurer and surety under the Judicial Commissioner's official bond. In their answer, defendants denied that there was probable cause to issue a criminal summons based upon the evidence presented. While defendants admit that Judge Cerny entered the room, they denied that he "joined the proceeding."

On December 10, 2004, Judge Rosenbalm heard oral argument on defendants' motion for summary judgment. At the close of the hearing, the Circuit Court judge rendered an opinion in open court, *inter alia,* as follows:

> But the simple question in this case that has to be addressed is this: What civil remedy, if any, exists in this state for the failure of a judicial commissioner to consider and issue an application for an arrest warrant or a criminal summons.
>
> And I find no case that says there is a civil remedy for that. And counsel has been apparently unable to cite me a case saying that there is a civil remedy for such alleged failure.
>
> In this case it is, I think, quite apparent from all that I have been told by counsel for the parties, that the judicial commissioner refused to issue a criminal summons, apparently because a police report had not been filed with respect to the allegations that these officers had committed some assault and battery and other wrongs.
>
> And the plaintiff wishes to show now that it was done because an investigation had not been completed.
>
> I am not sure that is any different from saying that a police report had not been filed. But be that as it may, it appears under Rule 20 of the General Sessions Court Rules that judicial commissioners may sign warrants for prosecutions initiated by private citizens, but only if a police report had been filed.

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[3]This court denied Mr. Harvey's applications to appeal pursuant to Tenn. R. App. P. 10 and 9. *Gary L. Harvey v. Stanley F. LaDuke,* E2004-01138-COA-R9-CV.

> And if I have to pass on anything, I would say this: That I think that to be a very reasonable requirement.
>
> The plaintiff in this case, if he were unable to get a criminal arrest warrant or a criminal summons from Commissioner Laduke (sic), he had every opportunity afforded by the law in this state to go to any state judge in this courthouse and make application for such criminal process.
>
> And as far as I can discern, until and unless he does that, he is not entitled to any relief here.
>
> So I am constrained to respectfully grant the motion to dismiss, which now should [be] called a Summary Judgment Motion in this case.

Although defendants did not move to dismiss Mr. Harvey's actions for declaratory judgment, the trial court judge ruled that "I do not believe this is a proper action for declaratory judgment; and I therefore grant the [summary judgment] motion on that ground also." The final judgment granting defendants' motion for summary judgment and dismissing the case was entered on December 21, 2004.

The trial court subsequently denied Mr. Harvey's Rule 52.02 Motion for Additional Findings by a Memorandum Opinion and Order that reads as follows:

> [T]he Court concluded as a matter of law that no civil remedy is afforded by the law of Tennessee to a private citizen who feels aggrieved by the refusal of a judicial commissioner to issue a criminal summons.
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> . . . .
>
> Plaintiff's ... Amended Complaint ... clothes his alleged cause of action with a variety of legal characterizations such as "certiorari, declaratory judgment, malicious harassment, failure and neglect to perform duties" and by references to certain Tennessee Constitutional provisions.
>
> In the opinion of the Court those legal characterizations add nothing to the viability of plaintiff's claim.
>
> Plaintiff's references to various Tennessee Constitutional provisions suggests (sic) that plaintiff believes that there must be some kind of civil remedy for every perceived grievance. The Court is not persuaded that such is the law. See, for example, Dillingham v. Tri-

> State Insurance Co., 381 SW2d 914 (Tenn. 1964), p. 919. Indeed, the Court believes that much of the energy of civil trial lawyers, as well as civil trial judges, must be devoted to determining when a civil remedy does, or does not, exist for various kinds of conduct.
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> . . . .

Knox County Circuit Court Mem. Op. (January 27, 2005) (Rosenbalm, J.). Mr. Harvey timely filed his notice of appeal.

II. Issues Presented

We have restated the issues presented for our determination as follows:

> 1. Whether Rules 20 and 25 of the Rules of Procedure of the General Sessions Court of Knox County, Tennessee, are invalid.
>
> 2. Whether Mr. Harvey has stated a claim for malicious harassment under Tenn. Code Ann. § 4-21-701.
>
> 3. Whether Mr. Harvey has established a claim for neglect of duty against the Judicial Commissioner.
>
> 4. Whether there is a private cause of action for damages under Article I, Section 35 of the Tennessee Constitution or under the Victims' Bill of Rights, T.C.A. § 40-18-102.
>
> 5. Whether there is an independent cause of action under T.C.A. § 8-19-301 on an official's bond.

III. Standard of Review

A motion for summary judgment should be granted when the movant demonstrates that there are no genuine issues of material fact and that the moving party is entitled to a judgment as a matter of law. Tenn. R. Civ. P. 56.04. The party moving for summary judgment bears the burden of demonstrating that no genuine issue of material fact exists. *Bain v. Wells,* 936 S.W.2d 618, 622 (Tenn. 1997). On a motion for summary judgment, the court must take the strongest legitimate view of the evidence in favor of the nonmoving party, allow all reasonable inferences in favor of that party, and discard all countervailing evidence. *Byrd v. Hall,* 847 S.W.2d 208 (Tenn. 1993). The standard of review for this court of a trial court's grant of summary judgment is *de novo,* with no presumption of correctness accorded the conclusions of the court below. *Bowden v. Ward,* 27 S.W.3d 913, 916 (Tenn. 2000); Tenn R. App. P. 13(d).

IV. Whether Rules 20 and 25 of the Rules of Procedure of the General Sessions Court of Knox County, Tennessee, are invalid.

A. Rules of Procedure for the General Sessions Court of Knox County, Tennessee

Under the authority of T.C.A. §§ 16-15-406 and 16-15-714, and through subsequent amendments, the General Sessions Court of Knox County has promulgated twenty-five rules for the conduct of its court, known as the "Rules of Procedure for the General Sessions Court of Knox County, Tennessee." Rules 20 and 25 set forth the procedure to follow in the event a private citizen desires to obtain a criminal warrant or criminal summons, and in the event the Judicial Commissioner declines to issue such warrant or summons. Mr. Harvey contends that the version of Rule 20 applicable at the time of his request for a criminal process pertained only to an "application for a criminal warrant" and a Judicial Commissioner signing a "warrant" initiated by a private citizen. Mr. Harvey notes that he did not apply for a criminal warrant or request Mr. LaDuke sign a warrant under Tenn. R. Crim. P. 4(c)(1). Instead, Mr. Harvey filed an affidavit of complaint for a criminal "summons" pursuant to Tenn. R. Crim. P. 4(c)(2). As to Rule 25, Mr. Harvey asserts that it applies only where the Judicial Commissioner initially finds that "probable cause doesn't exist to issue a warrant." In this case, Mr. Harvey claims that Mr. LaDuke did not refuse to issue the criminal summons because he found a lack of probable cause. Rather, the Judicial Commissioner declined to issue the summons because the defendants were law enforcement officers and no law enforcement investigation had been conducted.

On the date Mr. Harvey approached the Judicial Commissioner for a criminal summons, Rule 20 provided as follows:

> Initial application for a criminal warrant must be made to a Judicial Commissioner.
>
> Judicial Commissioners may sign warrants for prosecutions initiated by private citizens, but only if a police report has been filed. A copy of the police report must be presented to the Judicial Commissioner on duty by the complaining individual before the warrant is signed.
>
> . . . .

Id. The Rule was amended July 1, 2004, to specifically include "criminal summons" along with "criminal warrant." The version of Rule 25 applicable when Mr. Harvey sought issuance of a criminal summons stated as follows:

> It is the express purpose of this Rule to provide affiants, particularly law enforcement officers, and Judicial Commissioners, guidance and an orderly procedure for review and reconsideration when the Judicial Commissioner finds initially that probable cause doesn't exist to issue a warrant in a particular case. It is also the Court's express intention

to discourage "forum shopping" when a Judicial Commissioner declines to issue a warrant.

1. Criminal warrants, search warrants and seizure warrants are issued after a judicial proceeding which occurs upon application of the affiant to the Judicial Commissioner on duty. In the event the Judicial Commissioner, in the exercise of his or her independent judicial discretion, declines to issue the warrant for lack of probable cause, the affiant may not approach the same or another Judicial Commissioner until, after the following conditions are met:

(a) The affiant shall consult with the District Attorney or his or her assistant who may be available and on duty at the time, and shall conduct whatever additional fact-gathering or investigation the District Attorney or his or her assistant recommends prior to approaching the Judicial Commissioner for the second time.

(b) The District Attorney shall indicate, by conference with the Judicial Commissioner, either in person or by telephone, that the District Attorney has reviewed the allegations with the affiant, that the state intends to prosecute the case, and that based on their review they believe probable cause exists to allow the warrant to issue;

(c) The affiant shall volunteer the information to Judicial Commissioners that the affiant is applying for a warrant to issue for the second time based on the same incident.

2. If, after the above procedures are followed, the Judicial Commissioner still believes that probable cause doesn't exist, the affiant may apply to one Sessions judge to seek out issuance of the warrant, with the assistance of the District Attorney or his or her assistant, who shall confer with the judge as described in (1)(b) above; the judge responsible for supervising Judicial Commissioners is to be contacted for this purpose, and only in the event that the judge is unavailable shall any other judge be contacted.

3. Under no conditions shall it be appropriate for any affiant to approach a Judicial Commissioner three or more times to request that a warrant issue based on the same facts.

4. In all contacts between affiants and Judicial Commissioners, the proceedings shall be conducted with the degree of civility, professionalism and mutual respect as befits a judicial proceeding.

. . . .

Id. Rule 25 was also amended, effective June 3, 2004, to specifically include "criminal summons" along with "criminal warrant."

Mr. Harvey admits that he did not obtain or file a police report and, thus, could not present a copy of a police report to Mr. LaDuke. Additionally, after failing to obtain the issuance of the criminal summons from Mr. LaDuke, Mr. Harvey did not make his request to one of the General Sessions judges.

The General Assembly has authorized the promulgation of local rules of court in T.C.A. § 16-2-511. The statute requires that "[s]uch rules shall be consistent with the statutory law, the Rules of the Supreme Court and the Rules of Criminal and Civil Procedure." *Id.* Our Supreme Court has emphasized "the general rule that courts are reluctant to give effect to rules of procedure which seem harsh and unfair, and which prevent a litigant from having a claim adjudicated upon its merits." *Childress v. Bennett*, 816 S.W.2d 314, 316 (Tenn. 1991) (citing *Stapp v. Andrews*, 172 Tenn. 610, 113 S.W.2d 749, 750 (1938)). With these admonitions in mind, we must review Rules 20 and 25 in light of the provisions of Tenn. R. Crim. P. 4(a).

B. Tennessee Rule Criminal Procedure 4(a)

Rule 4(a) of the Tennessee Rules of Criminal Procedure reads as follows:

> RULE 4. ARREST WARRANT OR SUMMONS UPON COMPLAINT
>
> (a) **Issuance**. If it appears from the affidavit of complaint or supporting affidavits filed with the affidavit of complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall be issued by a magistrate or clerk to any officer authorized by law to execute it, or a criminal summons for the appearance of the defendant shall issue in lieu thereof. Before ruling on a request for a warrant, the magistrate or clerk may examine under oath the complainant and any witnesses the complainant may produce. The magistrate or clerk may issue a criminal summons instead of a warrant. The district attorney general may direct the clerk to issue either a criminal summons or a warrant. More than one warrant or criminal summons may issue on the same complaint. If a defendant fails to appear in response to the criminal summons, a warrant shall issue. ...

Tenn. R. Crim. P. 4(a). Mr. Harvey argues that the provisions of Tenn. R. Crim. P. 4(a) are mandatory. He asserts that a Judicial Commissioner must issue a warrant or summons regardless of who the defendant is, the results of investigations, or the wishes of law enforcement. Mr. Harvey contends that Tenn. R. Crim. P. 4(a) makes no provision for Mr. LaDuke to require or conduct an independent investigation, to receive proof from any source other than that produced by the complainant, or to make exceptions where the person to be charged is a law enforcement officer.

The first sentence in Tenn. R. Crim. P. 4(a) states that "[i]f it appears from the affidavit of complaint or supporting affidavits filed with the affidavit of complaint that there is probable cause ...." Therefore, contrary to the contention of Mr. Harvey, Rule 4(a) does not provide that the mere fact that an affidavit or supporting affidavits are presented automatically creates probable cause and requires that a Judicial Commissioner must issue a summons. The very validity of the summons depends upon the making of a probable cause determination. *See* Committee Comment, Tenn. R. Crim. P. 3, Affidavits of Complaint.

As to the issue of private citizens filing to request criminal process, the federal courts have consistently held that private citizens may not file criminal complaints before federal magistrates. *See, e.g., Pugach v. Klein*, 193 F.Supp. 630, 637 (S.D.N.Y. 1961). The number of state courts that have discussed the issue is minimal. *See* Herbert B. Chermside, Jr., Annotation, *Power of Private Citizen to Institute Criminal Proceedings Without Authorization or Approval by Prosecuting Attorney*, 66 A.L.R. 3d 732 (1975) (updated weekly). Some states have a specific rule providing that a citizen may not commence private prosecutions for alleged violations of criminal law. *See, e.g., State ex rel. Wild v. Otis*, 257 N.W.2d 361 (Minn. 1977). The American Bar Association has discouraged the practice of allowing private citizens to initiate criminal proceedings, emphasizing that "[t]he prosecution function should be performed by a public prosecutor who is a lawyer subject to the standards of professional conduct and discipline." *See American Bar Association Standards for Criminal Justice*, Std. 3-2.1 (Supp. 1986).

In *In re Monroe*, 174 W.Va. 401, 327 S.E.2d 163 (W.Va. 1985), a magistrate refused to issue an arrest warrant to a private citizen until a police investigation had been conducted. The West Virginia Supreme Court specifically disapproved of a procedure requiring a police investigation prior to a finding of probable cause and the issuance of an arrest warrant in a felony case. *Id.* at 405, 327 S.E.2d at 167. Phrased similarly to the language of Tenn. R. Crim. P. 4(a), W.Va. R. Crim. P. 4(a) provides as follows: "If it appears from the complaint, or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall be issued." The Court held that a police investigation was not a prerequisite to the issuance of an arrest warrant under W.Va. R. Crim. P. 4(a) and elaborated further as follows:

> Although a police investigation may coincidentally be conducted, such an investigation does not provide the legal basis for a finding of probable cause. The determination of whether probable cause exists to support the issuance of an arrest warrant under W.Va. Crim. P. 4 is solely a judicial function to be performed by the magistrate and is

> to be based upon the contents of "the complaint, or from an affidavit or affidavits filed with the complaint."

Id. at 405, 327 S.E.2d at 167 (citations omitted).

However, seven years later, in *Harman v. Frye,* 188 W.Va. 611, 425 S.E.2d 566 (W.Va. 1992), the Court was persuaded to reevaluate and change its position. The petitioner in the case, a magistrate, filed for a writ of mandamus to compel the Circuit Court to appoint a special prosecutor in a private citizen complaint. The magistrate specifically requested that the Supreme Court modify the rules of procedure and declare that private citizen criminal complaints be approved by an attorney for the State or investigated by the appropriate law enforcement agency before being presented to a magistrate for a probable cause determination. *Id.* at 612, 425 S.E.2d at 567. The West Virginia Supreme Court noted that the case before them brought to their attention "the misuse of the procedure allowing citizens to file complaints without any investigation by the prosecuting attorney or the appropriate law enforcement agency, and the administrative disorder which has resulted therefrom." *Id.* at 614, 425 S.E.2d at 569. The Court determined that citizens can misuse the right to file a criminal complaint before a magistrate by exaggerating the facts or omitting relevant facts they disclose to the magistrate, so as to transform a noncriminal dispute into a crime. *Id.* at 618, 425 S.E.2d at 573. Further, it was noted that some citizens may also seek to file frivolous, retaliatory or unfounded complaints against a neighbor or family member. *Id.* The Supreme Court indicated that when citizens file criminal complaints before a magistrate which later prove to be frivolous, retaliatory or unfounded, the prosecutor is required to take the time and expense to investigate the complaint before moving a *nolle pros* to dismiss. *Id.* The Court further noted that allowing citizens to file criminal complaints before a magistrate interferes with the discretion of the prosecutor in the control of criminal cases. *Id.* As a result of its findings, the West Virginia Supreme Court adopted a rule requiring either the prosecutor to evaluate private citizen complaints or the appropriate law enforcement agency to assist the prosecutor by investigating such criminal complaints prior to presenting them to a magistrate. *Id.* at 620, 425 S.E.2d at 575.

The function of court rules is to regulate practice of the court and facilitate the transaction of its business, but no court rule can enlarge or restrict jurisdiction or abrogate or modify substantive law. *Brewer v. State*, 215 S.W.2d 798 (Tenn. 1948); *Adcox v. Southern Ry. Co.*, 182 Tenn. 6, 14, 184 S.W.2d 37 (Tenn. 1944); *State v. Johnson,* 673 S.W.2d 877 (Tenn. Crim. App. 1984); *Richie v. Liberty Cash Grocers, Inc*., 63 Tenn. App. 311, 471 S.W.2d 559 (1971). Although Tennessee's procedural rules are not statutes, "the rules governing practice and procedure in the trial and appellate courts of this state are promulgated by the joint action of the legislature and the Supreme Court," and have the force and effect of law. *See Stempa v. Walgreen Co.*, 70 S.W.3d 39, 42 n. 2 (Tenn. Ct. App. 2001) (quoting *Richards v. Newby*, 1991 WL 163541 at * 3) (Tenn. Ct. App. Aug. 27, 1991). Thus, this court must apply the same rules of statutory construction that would be applicable if we were interpreting statutes. *Id.* If the language of the rule is plain, clear and unambiguous, it is our duty to simply enforce the rule as written. *State ex rel. Barger v. City of Huntsville,* 63 S.W.3d 397, 399 (Tenn. Ct. App. 2001).

As noted above, Tenn. R. Crim. P. 4(a) is phrased similarly to W.Va. R. Crim. P. 4(a), and, like the West Virginia Supreme Court in *Monroe*, we are persuaded that based on the clear language of Rule 4(a), a police report is not a prerequisite to the issuance of a criminal summons. *In re Monroe*, 174 W.Va. at 405, 327 S.E.2d at 167 ("The determination of whether probable cause exists ... is solely a judicial function to be performed by the magistrate and is to be based upon the contents of *'the complaint, or from an affidavit or affidavits filed with the complaint'*"(emphasis added)). Accordingly, pursuant to the current language of Tenn. R. Crim.P. 4(a), Rule 20 of Rules of Procedure for the General Sessions Court of Knox County, Tennessee, is found to be inconsistent with Tenn. R. Crim. P. 4(a) and, therefore, invalid. *See, e.g., Jennings v. Sewell-Allen Piggly Wiggly*, 173 S.W.3d 710, 713 (Tenn. 2005); *Kenyon v. Handal*, 122 S.W.3d 743, 752 n. 4 (Tenn. Ct. App. 2003); *Brown v. Daly*, 884 S.W.2d 121, 123-24 (Tenn. Ct. App. 1994). As Tenn. R. Crim. P. 4(a) is a "law" of the state, it is in full force and effect until such time as it is superseded by legislative enactment or an inconsistent rule is promulgated by the Tennessee Supreme Court and adopted by the General Assembly. *See State v. Hodges*, 815 S.W.2d 151, 155 (Tenn. 1991).

In light of our ruling, we need not address Mr. Harvey's constitutional challenge to Rule 20 and express no view on the validity of Rule 25 of the Rules of Procedure of the General Sessions Court of Knox County, Tennessee. We also have not discussed Mr. Harvey's contentions that Knox County and the Judicial Commissioner have a "custom and practice" of (1) requiring a private citizen to obtain a law enforcement investigation prior to being allowed to apply for criminal process and (2) refusing to issue process against a law enforcement officer because, other than the mere assertion, appellant offered no evidence that such customs and practices exist. As to Mr. Harvey's argument that Rule 20 was inapplicable to him because he requested a "summons" and not a "warrant," we note that his contention lacks merit, since a procedural rule applies retroactively not only to a cause of action arising before the effective date, but to all actions pending when it took effect, unless a contrary intention is indicated or immediate application would produce an unjust result. *Saylors v. Riggsbee*, 544 S.W.2d 609 (Tenn. 1976).

V. Malicious Harassment under T.C.A. § 4-21-701

Mr. Harvey also alleges a claim for damages for malicious harassment under the Tennessee Human Rights Act ("THRA"), T.C.A. § 4-21-701, the elements of which are derived from the criminal offense of civil rights intimidation under T.C.A. § 39-17-309. *See Washington v. Robertson County*, 29 S.W.3d 466, 468 (Tenn. 2000). T.C.A. § 4-21-701 reads as follows:

> **Creation of civil action – Damages.** – (a) There is hereby created a civil cause of action for malicious harassment.
> (b) A person may be liable to the victim of malicious harassment for both special and general damages, including, but not limited to, damages for emotional distress, reasonable attorney's fees and costs, and punitive damages.

Id. The companion statute to the civil claim of malicious harassment, T.C.A. § 4-21-702, provides as follows:

> **Alternative remedies preserved.** – The remedy for malicious harassment provided in this part shall be in addition to, and shall not preclude victims from seeking, other remedies, criminal or civil, otherwise available under the law.

Id.

The claim of malicious harassment is found within the THRA, which addresses discrimination based on race, creed, color, religion, sex, gender or national origin. *See* T.C.A. § 4-21-101, *et seq.* A claim of malicious harassment requires not only that a person acted maliciously, *i.e.*, with ill-will, hatred or spite, but also that a person unlawfully intimidated another from the free exercise or enjoyment of a constitutional right by injuring or threatening to injure or coercing another person or by damaging, destroying or defacing any real or personal property of another person. *See* T.C.A. § 39-17-309(b).

In *Surber v. Cannon*, No. M1998-00928-COA-R3-CV, 2001 WL 120735 (Tenn. Ct. App., M.S., Feb. 14, 2001), this court concluded that in order to be actionable under T.C.A. § 4-21-701, malicious harassment must be based on the victim's "race, color, ancestry, religion or national origin." *Id.* at *6; *see See Levy v. Franks*, 159 S.W.3d 66, 80 (Tenn. Ct. App. 2004). Appellant Harvey is a Caucasian male. He has not shown any actions of which he complains were because of race, color, ancestry, religion or national origin. Thus, we find that his claim for malicious harassment under T.C.A. § 4-21-701 of the THRA was properly denied by the trial court.

VI. Neglect of duty

Mr. Harvey additionally sued Mr. LaDuke for neglecting his duties as a Judicial Commissioner. He claims that Mr. LaDuke's refusal to issue process under the facts of this case violated the Judicial Commissioner's oath to uphold the laws of the State of Tennessee.[4] Defendants assert, however, that under Tennessee law, the Court of the Judiciary is vested with jurisdiction over claims of neglect of duty by a judicial officer. T.C.A. § 17-5-101, *et seq*.

The Court of the Judiciary exists to provide an orderly and efficient method for making inquiry into a "judge's manner of performance of duty" and provides "a process by which appropriate sanctions may be imposed." T.C.A. § 17-5-101(1) (B) and (2); Article VI, § 6 Tennessee Constitution. It is given broad powers to investigate, hear and determine charges sufficient to

[4]Tennessee judges are required "to administer justice without respect of persons, and impartially to discharge all the duties incumbent on a judge or chancellor." *See* T.C.A. § 17-1-104.

warrant discipline or removal. In particular, it is empowered to take cognizance of a judicial officer's "[w]illful or persistent failure to perform the duties of the office" or "[w]illful misconduct." T.C.A. § 17-5-302. The Court of the Judiciary has jurisdiction over all Tennessee judges created by the General Assembly or by the express or implied authority of the General Assembly. T.C.A. § 17-5-102. As the General Assembly has given local legislative bodies the authority to create, by ordinance, the positions of Judicial Commissioners, T.C.A. § 40-5-201, Judicial Commissioners, therefore, are created by the express authority of the General Assembly, or, at least, by the implied authority of the General Assembly. Accordingly, the Court of the Judiciary has jurisdiction over Judicial Commissioners, and the Circuit Court properly determined that it lacked jurisdiction over this claim. Additionally, because only the Court of the Judiciary has jurisdiction over an assertion of misconduct by a Judicial Commissioner, the claim on Mr. LaDuke's official bond pursuant to T.C.A. § 8-19-301 was also correctly dismissed by the Circuit Court.

VII. Tennessee Constitution Article 1, Section 35/ Rights of Victims of Crime, T.C.A. § 40-38-102

Mr. Harvey further contends that Mr. LaDuke's actions were unconstitutional in violation of Article I, Section 35 of the Tennessee Constitution, which provides as follows:

> **§ 35. Rights of victims of crimes**
>
> To preserve and protect the rights of victims of crime to justice and due process, victims shall be entitled to the following basic rights:
>
> 1. The right to confer with the prosecution.
>
> 2. The right to be free from intimidation, harassment and abuse throughout the criminal justice system.
>
> 3. The right to be present at all proceedings where the defendant has the right to be present.
>
> 4. The right to be heard, when relevant, at all critical stages of the criminal justice process as defined by the General Assembly.
>
> . . . .
>
> 7. The right to restitution from the offender.
>
> 8. The right to be informed of each of the rights established for victims.

> The general assembly has the authority to enact substantive and procedural laws to define, implement, preserve and protect the rights guaranteed to victims by this section.

Mr. Harvey asserts that he is a victim of crime and, therefore, a member of a constitutionally protected class pursuant to the provision. He argues that denying criminal process to a private citizen who was a crime victim because the defendants are law enforcement officers and requiring a law enforcement investigation of criminal charges against a law enforcement officer brought by such crime victim violates the constitutional provision. Mr. Harvey further claims the treatment he received violated "[t]he right to be free from intimidation, harassment and abuse throughout the criminal justice system" guarantee of Article 1, § 35 of the Tennessee Constitution. Additionally, Mr. Harvey asserts his rights under T.C.A. § 40-38-102(a)(1) and (a)(2) to "[b]e treated with dignity and compassion" and to receive "[p]rotection and support with prompt action in the case of intimidation or retaliation from the defendant and the defendant's agents or friends" were violated by the presence in the hearing room of two Knox County Sheriff's Deputies at the time scheduled for him to reappear before Mr. LaDuke. He seeks damages against the Judicial Commissioner and Knox County.

T.C.A. § 40-38-102 provides as follows:

> § 40-38-102. Rights of victims and witnesses; waiting areas
>
> (a) All victims of crime and prosecution witnesses have the right to:
>
> (1) Be treated with dignity and compassion; and
>
> (2) Protection and support with prompt action in the case of intimidation or retaliation from the defendant and the defendant's agents or friends.
>
> (b)(1) Without requiring the expenditure of additional funds or additional construction or renovation, whenever possible, victims of crime and prosecution witnesses should be provided waiting areas that are separate and secure from the defendant or defense witnesses during all stages of the judicial process.
>
> . . . .

Id.

Contrary to the contention of Mr. Harvey, T.C.A. § 40-38-108 provides immunity for failure to comply with any provision of the "Victims' Bill of Rights." The immunity extends to "the state, a political subdivision of the state, a government employee, or other official or entity." *Id. See Hawkins v. Case Management Inc.*, 165 S.W.3d 296, 299-300 (Tenn. Ct. App. 2004). As to Article

1, § 35 of the Tennessee Constitution, this court knows of no authority for the recovery of damages under that provision. *See, e.g., Lee v. Ladd*, 834 S.W.2d 323, 325 (Tenn. Ct. App. 1992). Thus, the Circuit Court did not err in granting defendants' motion for summary judgment as to these claims.

VIII. Conclusion

For the foregoing reasons, we affirm in part and reverse in part the judgment of the court below and remand for such further proceedings as may be necessary. Costs are judged against defendants for which execution may issue, if necessary.

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SHARON G. LEE, JUDGE